

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOANNA and JOAQUIN
FLORES, husband and wife,

Plaintiffs,

V.

CITY OF RICHLAND; JOHN
DOE NOS. 1-10.

Defendants.

NO. 4:15-CV-5110-LRS

**ORDER DENYING MOTION
FOR JUDGMENT ON THE
PLEADINGS**

CITY OF RICHLAND; JOHN
DOE NOS. 1-10.

Defendants.

BEFORE THE COURT is the Defendant City of Richland's Motion For Judgment On The Pleadings (ECF No. 7). This motion was heard with oral argument on March 17, 2016.

I. BACKGROUND

Pursuant to Fed. R. Civ. P. 12(c), Defendant City of Richland seeks entry of judgment in its favor on Plaintiffs' First Amended Complaint on the basis that the 42 U.S.C. §1983 claims pled therein are barred by the applicable statute of limitations. Courts entertaining claims brought under §1983 borrow a state's "general or residual statute for personal injury actions" to determine the applicable statute of limitations. *Owens v. Okure*, 488 U.S. 235, 250, 109 S.Ct. 573 (1989). In Washington, that is RCW 4.16.080(2) which provides a three year statute of limitations for "[a]n action . . . for any other injury to the person or rights of another not hereinafter enumerated." *Manning v. Washington*, 463 F.Supp.2d 1229, 1234 (W.D. Wash. 2006).

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1 Plaintiffs' original "Complaint For Personal Injuries And Damages
 2 (Negligence)" was filed in Benton County Superior Court on December 17, 2014.
 3 (ECF No. 1-1). It alleged only state law claims. This followed Plaintiffs' filing of
 4 an administrative "Claim For Damages" with the City of Richland on October 14,
 5 2014. (ECF No. 1-3 at pp. 106-112).¹ On August 25, 2015, Defendants² moved
 6 for summary judgment on the claims pled in Plaintiffs' original Complaint. (ECF
 7 No. 1-3 at pp. 60-61). On October 1, 2015, Plaintiffs filed a Motion For Leave To
 8 File An Amended Complaint. (ECF No. 1-3 at p. 193). On October 9, the Benton
 9 County Superior Court granted this motion. (ECF No. 1-3 at pp. 229-230). On
 10 October 16, 2015, Plaintiffs filed their First Amended Complaint, adding federal
 11 §1983 claims. (ECF No. 1-2 at pp. 17-24). On the same date, the Benton County
 12 Superior Court issued an order granting Defendants' Motion For Summary
 13 Judgment and dismissing with prejudice "[a]ll state law claims alleged by plaintiffs
 14 against defendants, including, but not limited to claims for assault and battery and
 15 negligence." (ECF No. 1-3 at pp. 225-227). The order recited that it had
 16 specifically considered "Plaintiffs' Complaint" and "Plaintiffs' First Amended
 17 Complaint," among other materials. (*Id.*). Following entry of this order, Defendant
 18 City of Richland removed the action to this court. (ECF No. 1).

19 **II. DISCUSSION**

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¹ Plaintiffs originally submitted their claim via letter dated October 9, 2014,
 22 bearing a date received stamp of October 13, 2014. (ECF No. 1-3 at pp. 100-104).
 23 They then resubmitted the claim using the city's form.
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25 ² Plaintiffs' original Complaint and First Amended Complaint names "John
 26 Does Nos. 1-10" as Defendants, in addition to the City of Richland.
 27

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1 The alleged injury giving rise to Plaintiffs' §1983 claims occurred during an
2 encounter with Richland police on October 15, 2011. Accordingly, those claims,
3 asserted for the first time in the First Amended Complaint filed on October 16,
4 2015, are well in excess of the three year statute of limitations and time-barred
5 unless they "relate back" to the original Complaint filed on December 17, 2014.
6 "Relation back" causes an otherwise untimely claim to be considered timely by
7 treating it as if it had been filed when the timely claims were filed. If the original
8 complaint was timely filed, expiration of the statute of limitations at the time of the
9 amendment is no bar. *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857-858 (9th Cir.
10 2011).

11 Defendant City of Richland contends "relation back" under Fed. R. Civ. P.
12 15(c) is not available to Plaintiffs because the claims asserted in their original
13 Complaint were not timely filed. *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d
14 999, 1007 (9th Cir. 2014)("[R]elation back does not help . . . if the original
15 complaint was not timely filed in the first instance"). According to Defendant,
16 Plaintiffs' original Complaint contained only causes of action for intentional torts-
17 assault and battery- governed by Washington's two year statute of limitations,
18 RCW 4.16.100(1). Those claims were untimely because they were contained in the
19 original Complaint filed on December 17, 2014, well in excess of two years of
20 October 15, 2011, the date on which the claims accrued. A negligence claim pled
21 for the first time in the First Amended Complaint filed on October 16, 2015,
22 would be untimely because that would be in excess of three years from October 15,
23 2011. And, of course, a §1983 claim pled in the First Amended Complaint would
24 also be untimely as there would be no timely claim in the original Complaint to
25 which it could "relate back." RCW 4.16.080(2) is the three year statute of
26 limitations governing negligence claims and, as noted above, is the limitations
27 period borrowed for determining the timeliness of §1983 claims.

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1 In *Boyles v. City of Kennewick*, 62 Wn. App. 174, 813 P.2d 178 (1991), the
 2 original complaint sought damages for alleged excessive force by a police officer.
 3 Thereafter, plaintiff moved to amend the complaint to add a cause of action
 4 alleging negligence, but the motion was not ruled upon by the superior court. The
 5 superior court denied a motion to dismiss based on the statute of limitations and the
 6 defendants sought review by the court of appeals. The court of appeals found the
 7 complaint made out a claim for assault and battery which was time-barred because
 8 it was filed in excess of the governing two year statute of limitations, RCW
 9 4.16.100(1). *Id.* at 177. The court of appeals noted that whether plaintiff could
 10 amend a pleading for damages based on excessive use of force to one based on
 11 negligence so that it related back, depended upon the factual allegations contained
 12 in the original complaint because under Washington law, factual allegations
 13 determine the applicable statute of limitations. *Id.* The court of appeals concluded
 14 that “[w]hile a claim for negligence against a police officer is possible, it is not
 15 raised by the factual allegations of the complaint in this case and, therefore, does
 16 not relate back to the original pleadings; additional facts would be necessary to
 17 support it.” *Id.* at 178.

18 Likewise here, the factual allegations in Plaintiffs’ original Complaint do not
 19 raise a claim for negligence against individual police officers.³ The factual
 20 allegations in the original Complaint, however, are sufficient to raise a claim for
 21 negligence against the City of Richland. This claim was pled in Paragraph 12 of

22
 23 ³ In Washington, “excessive force” is treated as the equivalent of the
 24 intentional torts of assault and battery because at issue is the intentional use of
 25 force by a police officer. There is no such thing as “negligent excessive force.”
 26
 27 Negligence and excessive force claims are distinct.
 28

1 the original Complaint which alleged: “The City of Richland is **directly and**
 2 **vicariously liable** for the negligence, which caused the claimants’ injuries. The
 3 City has negligently failed to properly supervise, train, hire and retain police
 4 officers, and has assumed vicarious liability for the negligence of its employees in
 5 this action.” (ECF no. 1-1 at p. 12)(emphasis added). This claim was repeated in
 6 Paragraph 17 of Plaintiffs’ First Amended Complaint. (ECF No. 1-2 at pp. 21-22).
 7 Plaintiffs did not re-characterize their negligence claim in their First Amended
 8 Complaint to gain the benefit of a longer limitation period (three years, as opposed
 9 to two years). Under Washington law, there is no inconsistency in alleging a
 10 municipality’s negligence for alleged excessive force committed by its police
 11 officers which gives rise to its direct liability, as opposed to vicarious liability for
 12 the officers’ alleged excessive force. See *LaPlant v. Snohomish County*, 162
 13 Wn.App. 476, 479, 271 P.3d 254 (2011)(“[W]hen an employee acts outside the
 14 scope of employment . . . an employer has a limited duty to control an employee
 15 for the protection of a third person. This direct, independent duty can give rise to
 16 an action for negligent hiring, training, and supervision.”). Vicarious liability
 17 arises when an employee commits a tortious action within the scope of his
 18 employment and it is analytically distinct and separate from liability under
 19 negligent hiring, retention, and supervision theories. *Id.* at 479 and footnotes 6 and
 20 7.

21 Defendants’ motion for summary judgment filed with the Benton County
 22 Superior Court (filed after the Plaintiffs’ original Complaint, but before their
 23 Amended Complaint) acknowledged Plaintiffs were making a claim “that the City
 24 is **directly** liable in this case based upon its negligent failure to properly supervise,
 25 train, hire, and retain the ‘John Doe’ officers involved in this incident,” citing
 26 Paragraph 12 of Plaintiff’s original Complaint. (ECF No. 1-3 at p. 064)(emphasis
 27 added). Defendants sought summary judgment on Plaintiffs’ negligence

1 claims based on Washington’s public duty doctrine and there being “no
2 evidence supporting their claims against the City for negligent hiring,
3 training, supervision, and retention of RPD officers.” (ECF No. 1-3 at pp.
4 071-074).⁴ The order entered by the Benton County Superior Court granting
5 Defendants’ motion for summary judgment acknowledged that Defendants were
6 seeking “an order granting summary judgment on state law claims for assault and
7 battery **and negligence**” and found they were “entitled to summary judgment on
8 the state law assault and battery **and negligence** claims.” (ECF No. 1-3 at pp. 225-
9 26). (Emphasis added). Defendants’ summary judgment motion and the
10 superior court order granting the motion treated as distinct the claims for
11 assault and battery and the claim for negligence pled in Plaintiffs’ original
12 Complaint.

13 Fed. R. Civ. P. 15(c)(1)(B) provides: “An amendment to a pleading relates
14 back to the date of the original pleading when . . . the amendment asserts a claim or
15 defense that arose out of the conduct, transaction, or occurrence set out- or
16 attempted to be set out- in the original pleading” Plaintiffs’ §1983 claims
17 asserted in their First Amended Complaint clearly arise from the same conduct set
18 out in their original Complaint. These claims “relate back” to Plaintiffs’ original
19 Complaint filed on December 17, 2014, which itself was timely with respect to the
20 negligence claim pled therein as it was filed within three years after the alleged
21 injury on October 15, 2011. Plaintiffs’ administrative claim filed on October 14,
22 2014, tolled the running of the three year statute of limitations pursuant to RCW

⁴ Defendants sought summary judgment on Plaintiffs' intentional tort claims on the basis that they were time-barred pursuant to the governing two year statute of limitations, RCW 4.16.100(1). (ECF No. 1-3 at pp. 066-070).

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1 4.96.020(4)⁵ , resulting in Plaintiffs timely filing their original Complaint on
2 December 17, 2014, insofar as the negligence claim pled therein. Filing the
3 original Complaint on December 17, 2014, had the effect of commencing the
4 action “within five court days after the sixty calendar period ha[d] elapsed” on
5 December 13, 2014⁶ , and therefore, the original Complaint for statute of limitations
6 purposes “is deemed to have been presented on the first day after the sixty calendar
7 day period elapsed,” that being December 14, 2014. December 14, 2014 was one
8 day short of expiration of the limitations period applicable to Plaintiff’s
9 negligence claim arising from an alleged injury occurring on October 15, 2011.⁷

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11 ⁵ This statute provides:

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28 No action subject to the claim filing requirements of this section
shall be commenced against any local governmental entity, or
against any local governmental entity’s officers, employees, or
volunteers, acting in such capacity, for damages arising out of
tortious conduct until sixty calendar days have elapsed after the claim
has first been presented to the agent of the governing body thereof.
The applicable period of limitations within which an action must be
commenced shall be tolled during the sixty calendar day period. For
the purposes of the applicable period of limitations, an action
commenced within five court days after the sixty calendar period has
elapsed is deemed to have been presented on the first day after the
sixty calendar day period elapsed.

⁶ 60 days from October 14, 2014.

⁷ When the administrative claim was filed on October 14, 2014, one day
remained on the three year statute of limitations applicable to the negligence claim.
Because of the tolling resulting from RCW 4.96.020(4), that one day remained on
December 14, 2014.

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III. CONCLUSION

Defendant's Motion For Judgment On The Pleadings (ECF No. 7) is **DENIED**. Plaintiff's 42 U.S.C. §1983 claims are timely and are not barred by the three year statute of limitations.

At present, the only claims which have not been adjudicated and remain for adjudication by this court are the §1983 claims. All state law claims, including the negligence claim, have been adjudicated by Benton County Superior Court and those interlocutory rulings remain in effect and may be appealed to the Ninth Circuit Court of Appeals after final judgment is entered by this court. *Pleaseau v. Prudential Ins. Co. of America*, 591 F.2d 74, 79 (9th Cir. 1979). See also 28 U.S.C. §1450 (all “orders and other proceedings had in [state court] action prior to its removal shall remain in full force and effect until dissolved or modified dissolved by the district court”).

IT IS SO ORDERED. The District Court Executive shall enter this order and forward copies to counsel of record.

DATED this 1st day of April, 2016.

s/Lonny R. Suko

LONNY R. SUKO
Senior U. S. District Court Judge

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